



**FOLEY
HOAG** LLP
ATTORNEYS AT LAW

January 30, 2004

Mary Beth Gentleman
Boston Office
617-832-1199
mgentleman@foleyhoag.com

By Hand

Ms. Mary L. Cottrell
Secretary
Department of Telecommunications & Energy
One South Station
Boston, MA 02110

Re: D.T.E. 03-83
Petition of USGen New England, Inc.

Dear Ms. Cottrell:

On behalf of USGen New England, Inc. ("USGenNE"), I enclose for filing in the above-referenced docket one original and one copy of the Reply Brief of USGen New England, Inc.

Kindly date stamp the enclosed copy of this letter, and return same to our messenger.

Thank you for your attention to this matter.

Sincerely,

Mary Beth Gentleman

MBG:jrd
Enclosures

cc: Selma Urman, Hearing Officer (9 copies)
Diedre Matthews, Director, Siting Division (1 copy)
William Febiger, Technical Director, Siting Division (1 copy)
Jolette Westbrook, General Counsel, Siting Board (1 copy)
Amy Barad, Analyst, Siting Division (1 copy)
Louis M. Arak, Project Manager (1 copy)
Service List

16/375191.1

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Petition for Zoning Exemption Pursuant
to Mass. Gen .L. c. 40A, § 3 for Salem
Harbor Station's 310 CMR 7.29
Emissions Control Project

D.T.E. 03-83

REPLY BRIEF OF USGen NEW ENGLAND, INC.

I. INTRODUCTION

On January 23, 2004, New England Power Company ("NEP") filed its initial brief as an intervenor in these proceedings (the "NEP Brief"). The NEP Brief requests that: (i) NEP's filings in D.T.E. 03-128 (the "Proposed Evidence")¹ be incorporated by reference into these proceedings pursuant to 220 C.M.R. 1.10(3); (ii) the Department not issue any order that would have the effect of interfering in any way with NEP's proposed expansion plans for the Switchyard; and (iii) the Department "condition any exemption applicable to the Switchyard on successful, further negotiations and consultations between USGenNE and NEP regarding the location and construction schedule for their respective facilities." (NEP Brief at 2 and 4). For the reasons set forth below, each of these requests should be denied.

¹ In D.T.E. 03-128, NEP has petitioned for an exemption from the City of Salem Zoning Ordinance for an expansion of the same 115 kV switchyard at Salem Harbor Station (the "Switchyard") which will be affected by the USGenNE's Emissions Control Project ("ECP") that is the subject of this proceeding (the "Project").

II. ARGUMENT

A. **NEP IS BARRED FROM INTRODUCING ADDITIONAL EVIDENCE IN THESE PROCEEDINGS**

1. **NEP's Request for the Introduction of the Proposed Evidence Is barred by 220 C.M.R. 1.11(8)**

NEP's request to introduce the Proposed Evidence in these proceedings is barred by 220 C.M.R. 1.11(8), which prohibits any party from "present[ing] additional evidence after having rested . . . except upon motion and showing of good cause." NEP has provided no "showing of good cause" in its brief for its failure to introduce the Proposed Evidence prior to having rested in these proceedings. In fact, NEP offers no reason whatsoever for this failure.

As an initial matter, NEP offers no reason for its failure to submit the Proposed Evidence by the December 12, 2003 deadline for the submission of its Intervener Direct Case as required by the Procedural Schedule. *See* Petition of USGen New England, Inc. D.T.E. 03-83, Procedural Schedule, November 3, 2003. Since NEP prepared and filed the Proposed Evidence in D.T.E. 03-128 as early as December 3, 2003, NEP certainly had ample time to meet the December 12, 2003 deadline for the submission of the Proposed Evidence in these proceedings. Moreover, NEP has shown no cause for its failure to move for the introduction of the Proposed Evidence during the evidentiary hearing on January 13, 2004, or, for that matter, at any time prior to the official closure of the record.² In sum, NEP has failed to show any cause whatsoever, much less the requisite "good cause" under 220 C.M.R. 1.11(8), for its request to introduce the

² The record in these proceedings remained open after January 13, 2004 only for the submission of record requests, which were due on January 20, 2004. (Tr. 135).

Proposed Evidence after having rested in these proceedings. For this reason alone, NEP's request to introduce the Proposed Evidence should be denied.

2. **220 C.M.R. 1.10(3) is Inapplicable to NEP's Request for the Introduction of the Proposed Evidence**

Moreover, NEP's reliance on 220 C.M.R. 1.10(3) as the basis for its request for the introduction of the Proposed Evidence is misplaced. 220 C.M.R. 1.10(3) provides as follows:

Documentary Evidence; Incorporation by Reference. Any matter contained in any records, investigations, reports and documents in the possession of the Department of which a party or the Department desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding.

220 C.M.R. 1.10(3)("Section 1.10(3)"). Contrary to NEP's apparent position, Section 1.10(3) creates an express, affirmative obligation on the part of the party that proposes to incorporate documentary evidence by reference in a proceeding to "offer" such evidence "in the proceeding." 220 C.M.R. 1.10(3). NEP's assumption that Section 1.10(3) would permit the incorporation by reference of the Proposed Evidence even *after* the close of these proceedings ignores this affirmative obligation. Such an interpretation of Section 1.10(3) is irreconcilable with the plain language of 220 C.M.R. 1.11(8), which prohibits a party's presentation of additional evidence after the close of a proceeding without good cause. NEP's interpretation would severely prejudice other parties, who would have had no notice of or opportunity to respond to the additional evidence during the proceeding. NEP has offered no argument as to why Section 1.10(3) should trump the application of 220 C.M.R. 1.11(8).

B. USGenNE's REQUEST TO INTRODUCE THE PROPOSED EVIDENCE IS BARRED BY THE DEPARTMENT'S OWN RULING ON THE SCOPE OF THIS PROCEEDING

Even if a request to incorporate evidence by reference after the close of the record were theoretically allowed in some circumstances under 220 C.M.R. 1.10(3) and 1.11(8), which it is not, the Proposed Evidence would still be barred as a result of the Department's own ruling on the scope of this particular proceeding. *See USGen New England, Inc.*, Hearing Officer Ruling on Petitions for Leave to Intervene Filed by the Massachusetts Division of Energy Resources and New England Power Company, D.T.E. 03-83, October 27, 2003, at 3 (the "Ruling"). In its petition to intervene, NEP claimed that it was substantially and specifically affected in these proceedings because of NEP's plans to install a new bay and capacitor bank at the Switchyard. *See New England Power Company's Petition to the Department for Leave to Intervene*, D.T.E. 03-83, October 14, 2003, at ¶ 19 (the "NEP Petition"). Thus, according to NEP, there was a need to coordinate its proposed expansion of the Switchyard with the Project. *See Ruling*, at 2.

In its Ruling permitting NEP to intervene, the Department made clear that "any dispute between NEP and [USGenNE] regarding property rights and obligations related to the [S]witchyard is governed by the [Continuing Site Agreement ("CSA"), and that] issues related to such rights and obligations are beyond the scope of a proceeding under G.L. c. 40A, § 3, and will not be adjudicated in this proceeding." *See Ruling*, at 3. Since NEP's request to introduce the Proposed Evidence is directly related to negotiations between NEP and USGenNE relative to the Switchyard, and since such negotiations are governed by the CSA and thus are beyond the scope of the proceeding, the request should be denied. *See id.*; NEP Petition, at Attachment A. NEP itself admits that the Proposed

Evidence concerns “the need for and design of NEP’s proposed expansion of the [Switchyard] . . .,” and that “a number of details remain to be worked out between the parties” regarding this expansion. *See* NEP Brief, at 2 and 3. Each of these concerns directly relates to the obligations of the parties under the CSA. *See* NEP Petition, at Attachment A. Since the Department unequivocally and correctly ruled that issues related to the rights and obligations between NEP and USGenNE that are governed by the CSA are beyond the scope of this proceeding, the Proposed Evidence is on its face irrelevant and should be barred. *See* Ruling, at 3.³

C. NEP’S REQUEST THAT THE DEPARTMENT’S ORDER NOT INTERFERE WITH NEP’S EXPANSION PLANS FOR THE SWITCHYARD IS BASELESS

The Department has stated explicitly that issues related to the parties’ respective property rights and obligations related to the Switchyard are “beyond the scope of a proceeding under G.L. c. 40A, § 3, and will not be adjudicated . . .” *See* Ruling, at 3. In so finding, the Department acknowledged that the resolution of any issues related to NEP’s Switchyard expansion plans is governed by the terms of the CSA. The Department noted that the CSA governs “any dispute between NEP and [USGenNE] regarding property rights and obligations related to the [S]witchyard . . .” *See id.* It is the CSA, therefore, and not the terms of the Department’s order to be issued in these proceedings that controls the relationship between the Project and NEP’s Switchyard expansion plans. In light of the Department’s clear ruling on this issue, NEP’s request to shape the Department’s order based on its own plans at the Switchyard should be rejected.

³ To the extent that the Department needs to refer to NEP’s Project in its order in this matter, USGenNE submitted an exhibit depicting the location of NEP’s Project. (Exh. NEP-1-5-1; TR. 67).

In any event, USGenNE has already provided ample evidence in response to Information Requests issued by NEP in this proceeding of USGenNE's commitment to ensuring that the Project and NEP's Switchyard plans proceed without conflict. NEP has provided no evidence to the contrary. For example, the record reflects that USGenNE and NEP have already met several times to coordinate their respective projects at the Switchyard. (*See* Exh. NEP-1-6). USGenNE has also demonstrated that the Project's gas metering station does not encroach upon NEP's transmission easement based on current plans, and that USGenNE is committed to working closely with NEP on this issue. (Exh. NEP-1-3; Exh. NEP-1-4; Tr. 82). USGenNE has further shown that, prior to the design of its proposed 115 kV cable trenches, it will determine the exact location and depth of NEP's existing buried cables and duct banks. (Exh. NEP-1-6). In contrast, NEP has produced no evidence whatsoever that the Project would in any way interfere with NEP's Switchyard expansion plans. The Department cannot be expected in its order to protect NEP from alleged "interferences" with NEP's Switchyard project that even NEP cannot identify.

D. NEP'S REQUEST FOR CONDITIONS ON THE ISSUANCE OF A COMPREHENSIVE EXEMPTION DEFEATS THE PURPOSE OF THESE PROCEEDINGS

USGenNE has requested a comprehensive zoning exemption in these proceedings because the complexity of the Project may require additional exemptions from the Zoning Code other than those currently deemed necessary. *See* Initial Brief of USGen New England Inc., D.T.E. 03-83, January 23, 2004, at 15-24. The process for obtaining these additional exemptions would likely hinder USGenNE's ability to complete the Project within the Administrative Consent Order's timelines. *See id.* at 19. A grant of

comprehensive zoning relief for the Project that is conditioned on further negotiations and consultations between NEP and USGenNE would negate any such “relief.”

To condition any zoning exemption applicable to the Switchyard upon USGenNE’s successful, further negotiations and consultations with NEP would be to hold the timely completion of the Project hostage to additional, and as yet unknown, demands from NEP. This is precisely the result that USGenNE seeks to avoid by obtaining comprehensive zoning relief for the Project through these proceedings. For example, in the course of “negotiations and consultations” relative to the Switchyard, NEP could demand additional construction conditions that could delay the Project to the same extent as a requirement to seek additional exemptions from the City of Salem Zoning Ordinance as a result of Project changes. In effect, there would be no practical difference between the delay to the Project caused by negotiations and consultations with NEP, and the delay to the Project caused by the need to seek further exemptions from the City of Salem Zoning Ordinance in the future. In sum, conditioning a comprehensive zoning exemption for the Project on the success of further negotiations and consultations with NEP would render such an exemption meaningless, undercutting the very purpose of G.L. c. 40A, §3.

III. Conclusion

For the aforementioned reasons, NEP’s requests that the Department: (i) incorporate the Proposed Evidence by reference in these proceedings; (ii) not issue any Order that would have the effect of interfering in any way with NEP’s proposed expansion plans for the Switchyard; and (iii) condition any zoning exemption applicable

to the Switchyard on successful, further negotiations and consultations between USGenNE and NEP, should be DENIED.

Respectfully submitted,

USGEN NEW ENGLAND, INC.

By its attorneys,

A handwritten signature in cursive script, appearing to read "Mary Beth Gentleman", is written over a horizontal line.

Mary Beth Gentleman

Pat A. Cerundolo

FOLEY HOAG LLP

World Trade Center West

155 Seaport Boulevard

Boston, MA 02210-2600

(617) 832-1000

Dated: January 30, 2004